IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16127 of 2006

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No

2 To be referred to the Reporter or not ? No

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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DHARAMSINGH BAXISINGH RAJPUT - Petitioner(s)
Versus
STATE OF GUJARAT THR' COMMISSIONER OF TOURISM & ORS. - Respondent(s)

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Appearance :
MR BS SUPEHIA for Petitioner

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

Date : 03/08/2006

ORAL JUDGMENT (Per: HON'BLE MR.JUSTICE J.M.PANCHAL)

1. By filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue a Writ of Mandamus or any other appropriate Writ or order to declare that the respondent No.3, i.e. the Deputy Sales Tax Commissioner, Division-14, Bharuch, has no authority to issue notice dated July 14,2006, calling upon him to show cause as to why the benefit of Rs.2,14,000/- availed of by the petitioner as sales tax exemption be not withdrawn. The petitioner has further prayed to declare that the respondents are estopped from recovering any amount of tax which was exempted in terms of certificate dated December 16, 2003, issued by the Commissioner of Tourism.

2. The petitioner, i.e. Dharamsingh Baxisingh Rajput is partner of Hotel Nyay Mandir situated on Zadeshwar National Highway No.8,

Bharuch. The Government of Gujarat introduced a policy known as “New Package Scheme for Incentive for Tourism Project, 1999-2000” by Circular dated December 20, 1995. The said scheme was introduced to boost tourism sector in the State. The petitioner applied for temporary registration certificate which was granted by the Commissionerate of Tourism on October 16, 2000, which is quite evident from the contents of the document produced at Annexure-A to the petition. The petitioner thereafter made necessary application to grant adhoc eligibility certificate so as to enable the firm to obtain the relevant tax exemption certificate from the concerned competent authority. Accordingly, the Commissionerate of Tourism, Gandhinagar, granted adhoc eligibility certificate for tax incentive dated December 16, 2003, which is produced by the petitioner at Annexure-C to the petition. The Commissioner of Tourism thereafter certified that the eligible investment in the fixed estate project of the

unit was Rs.35,60,000/- and that the petitioner was entitled to tax benefit tentatively at the rate of 20%. The petitioner was not given benefit of the remaining 80% as contemplated by the scheme. Therefore, the petitioner invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution and filed Special Civil Application No.19917 of 2005 with a prayer to direct the respondent No.1 therein to issue remaining 80% tax exemption certificate. The said petition came up for hearing before the Division Bench comprising A.R.Dave and Miss R.M.Doshit, JJ, on January 30, 2006. After hearing the learned cousnel for the petitioner, the Division Bench interalia held that admittedly, the petitioner had commenced commercial operations contemplated under the scheme on July 16, 2002, i.e. after the last date which was prescribed in the scheme for availing the benefit under the scheme and that the petitioner did not fulfil all the

conditions incorporated in the scheme, as a result of which, adhoc eligibility certificate issued in favour of the petitioner was of no help to the petitioner. In view of abovereferred to conclusions, the Division Bench dismissed the petition by an order dated January 30, 2006.

3. Thereafter, the petitioner submitted speaking-to-minutes making grievance that the facts mentioned in the petition and the contentions raised at the Bar were not reflected in the order dated January 30, 2006, passed in Special Civil Application No.19917 of 2005, and therefore, appropriate orders should be passed. The record shows that note for speaking-to-minutes submitted by the petitioner was rejected by the Division Bench vide order dated February 21, 2006. In view of the findings recorded by the Division Bench of this Court while disposing of Special Civil Application No.19917 of 2005, the respondent No.3 has addressed a

notice dated July 14, 2006, calling upon the petitioner to show cause as to why the benefit availed of by the petitioner of Rs.2,14,000/- towards sales tax exemption under the scheme be not withdrawn.

4. The case of the petitioner is that the respondent No.3 has no authority to issue the show cause notice to the petitioner because the certificate entitling the petitioner to avail the tax benefit under the scheme was issued by the Tourism Department and not by the Sales Tax Department. What is mentioned by the petitioner in the petition is that the petitioner did not charge any sales tax from its customers in view of the adhoc tax eligibility certificate dated December 16, 2003, and therefore, now it is not open to the respondent No.3 to recover the same from the petitioner. It is mentioned by the petitioner that earlier petition was filed for grant of remaining 80% tax exemption certificate to the petitioner and not for

repaying the exemption which was already granted to the petitioner and therefore, the impugned notice is liable to be set aside. Under the circumstances, the petitioner has filed the instant petition and claimed reliefs to which reference is made earlier.

5. This Court has heard Mr.B.S.Supehia, learned counsel for the petitioner, at length and in great detail. This Court has also considered the documents forming part of the petition.

6. This is a writ petition which is directed against show cause notice and therefore, normally it should not be entertained. However, the petitioner has emphatically maintained that the respondent No.3 has no jurisdiction to issue the said notice and therefore, this Court has considered the points on merits which were urged at the Bar with great vehemence. From the record of the case, it is evident that adhoc eligibility certificate dated December 16, 2003, was

granted to the petitioner by Commissionerate of Tourism, Gandhinagar. In the certificate, it was specifically mentioned that the certificate did not entitle the petitioner to avail the tax exemption automatically on the basis of the certificate. What is relevant to notice is that by communication dated December 16, 2003, which is produced on the record of the petition at Annexure-C, the petitioner was required to approach and apply to the competent authority along with the adhoc eligibility certificate to avail tax exemption certificate under the specified taxes and the petitioner was also called upon to abide by the terms and conditions to be incorporated in the tax exemption certificate which was to be issued by the concerned competent authority entitled to grant exemption. Under the circumstances, there is no manner of doubt that tax exemption benefit was not granted to the petitioner by the Commissionerate of Tourism but by the Sales Tax Department of the State of Gujarat.

Therefore, the plea that the respondent No.3 has no authority to issue the notice impugned in the petition cannot be accepted and is hereby rejected. The plea that the petitioner did not charge any sales tax from its customers and therefore, now it is not open to the respondent No.3 to withdraw the benefit already availed of by the petitioner has also no substance. It may be mentioned that the tax exemption benefit was to be granted on fulfillment of conditions stipulated in the scheme which was introduced by the State Government vide Resolution dated December 20, 1995. The Division Bench of this Court, while dismissing Special Civil Application No.19917 of 2005, has specifically held that the petitioner had commenced commercial operations contemplated under the scheme only on July 16, 2002, i.e. after the last date which was prescribed in the scheme for availing benefit under the scheme and that the petitioner did not fulfil all the conditions incorporated in the

scheme. The above-quoted findings recorded by the Division Bench of this Court have become final because it is not pointed out by the learned counsel for the petitioner that the judgment delivered by the Division Bench in Special Civil Application No.19917 of 2005 was challenged before the higher forum. As the petitioner had failed to fulfil all the conditions incorporated in the scheme and had commenced operations on July 16, 2002, this Court is of the opinion that the petitioner was not entitled to 20% benefit which was granted to him under the adhoc eligibility certificate. Therefore, the respondent No.3 is entitled to recover the said amount notwithstanding the fact that no sales tax was recovered by the petitioner from its customers. The important fact that the petitioner was never granted final eligibility certificate under the scheme cannot be ignored while adjudicating claims raised in the petition. The petitioner was granted only an ad-hoc eligibility

certificate on the basis of which sales tax exemption to the tune of Rs.2,14,000/- was granted to the petitioner. The petitioner now claims that the petitioner be permitted to retain the said amount and everyone should forget the admitted fact that the petitioner had not fulfilled the conditions stipulated in the scheme. Such a claim can never be upheld by High Court while exercising discretionary power under Article 226 of the Constitution. If such a claim is upheld it would amount to directing the respondents to treat the benefit unauthorisedly availed of by the petitioner as charity to the petitioner from the respondents and forget about it irrespective of the fact that the petitioner was not entitled to the said benefit under the scheme. Such a course is not permissible to the Court while exercising powers under Article 226 of the Constitution. One who does not fulfil the conditions stipulated in the scheme would naturally not be entitled to claim the benefit under the

scheme. Therefore, the claim advanced by the petitioner that the respondents are estopped from recovering the amount of tax which was exempted as per certificate dated December 16, 2003, cannot be upheld.

7. The contention that when adhoc eligibility certificate for tax incentive was granted on December 16, 2003, the authorities were knowing fully well that the petitioner had commenced commercial operations contemplated under the scheme on July 16, 2002, i.e. after the last date which was prescribed in the scheme for availing benefit under the scheme and therefore, the respondents are not entitled to recover the amount of exemption which was already availed of by the petitioner, is merely stated to be rejected. The eligibility of a unit for tax incentive under the scheme has to be judged from the fact whether the unit has fulfilled conditions stipulated therein. The record does not indicate that by issuing certificate

dated December 16, 2003, the respondent No.3 or for that matter, any other competent authority had condoned the lapse committed by the petitioner. In fact, the scheme does not contemplate any relaxation in the eligibility criteria laid down therein and therefore, admitted lapse on the part of the petitioner could not have been condoned by anyone. Therefore, it is wrong to contend that as the respondents were knowing fully well that the petitioner had commenced commercial operations contemplated under the scheme on July 16, 2002, i.e. after the last date which was prescribed under the scheme for availing benefit under the scheme, now they are precluded from recovering the benefit of tax availed of by the petitioner.

8. On overall view of the matter, this Court is satisfied that there is no substance in the petition and therefore, the petition, which lacks merit, deserves be dismissed.

9. For the foregoing reasons, the petition fails and is summarily dismissed.

(J.M.Panchal, J.)

(Smt.Abhilasha Kumari, J.)

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